UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRINKER INTERNATIONAL PAYROLL COMPANY LP, a limited partnership, Respondent, and THE SAWAYA & MILLER LAW FIRM, Charging Party.	Case 27-CA-110765

RESPONDENT BRINKER INTERNATIONAL PAYROLL COMPANY LP'S RESPONSE TO NOTICE TO SHOW CAUSE AND BRIEF IN OPPOSITION TO REMAND

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BRINKER INTERNATIONAL PAYROLL COMPANY LP

Brinker International Payroll Company, L.P. ("Brinker" or "Respondent"), through undersigned counsel, submits this Response to Notice to Show Cause and Brief in Opposition to Remand.

I. INTRODUCTION

This dispute stems from the 2012 version of Respondent's Agreement to Arbitrate, which the Board and Administrative Law Judge previously found to violate Section 8(a)(1) of the Act under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).[1] On December 16, 2020, the Board issued a Notice to Show Cause directing the parties to show cause why this proceeding should not be remanded to the Administrative Law Judge for review under *The Boeing Co.*, 365 NLRB No. 154 (2017). As stated in the Board's Notice to Show Cause, *Boeing* overruled the "reasonably construe" standard in *Lutheran Heritage* and replaced it with a new standard that applies retroactively to all cases that were pending at the time of the decision. As a result, the only issue before the Board is whether the 2012 version of the Agreement to Arbitrate is lawful under the *Boeing* framework.[2] For the reasons discussed below, remand is unnecessary and the 2012 Agreement to Arbitrate is lawful under *Boeing*.

II. REMAND IS UNNECESSARY AND WOULD ONLY FRUSTRATE JUDICIAL EFFICIENCY

There is no reason to remand this case to the ALJ. The only remaining issue is narrow, and it can be decided based solely on the language in the Agreement to Arbitrate, which is already in the record. Indeed, there are no facts in dispute, as evidenced by the parties' March 31, 2014 joint

[1] *Lutheran Heritage* held, among other things, that a facially neutral rule violates the Act if employees would "reasonably construe" it to prohibit or restrict Section 7 rights.

[2] The ALJ and Board also determined the Agreement to Arbitrate violated the Act by including a class waiver, which is no longer at issue due to the Supreme Court's decision in *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018).

motion to waive the hearing and submit the case to the Administrative Law Judge and joint Stipulation of Facts. (ALJ Dec., p. 1) Furthermore, as discussed below, there is no reason to reopen the record for supplemental evidence because the Agreement to Arbitrate does not require a balancing of interests under *Boeing.* Furthermore, the Board has recently determined remand was unnecessary in several similar situations. *See Alexandria Care Center, LLC*, 369 NLRB No. 94 (2020) (finding remand unnecessary to reevaluate the facial lawfulness of arbitration agreement that was part of the record); *20/20 Communications, Inc.*, 369 NLRB No. 119 (2020) (same); *CBRE, Inc.*, 368 NLRB No. 152 (2019) (same).

Moreover, remanding this matter would only serve to further delay this never-ending proceeding. Indeed, this case has pending since the unfair labor practice charge was originally filed on August 7, 2013—more than seven years ago. The related litigation between the parties has long since been resolved. *See Hickey, et. al. v. Brinker Restaurant Corporation, et al.*, Order of Dismissal, Case No. 14-1102 (10th Cir. Nov. 17, 2014).[3] Accordingly, the Board should render a decision to bring this matter to full and final resolution as quickly as possible.[4]

III. THE AGREEMENT TO ARBITRATE DOES NOT VIOLATE THE ACT

The relevant portion of the 2012 Agreement to Arbitrate provides: "This agreement applies to all disputes involving legally protected rights…***This agreement does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC)***."[5]

[3] Charging Party also requested to withdraw the unfair labor practice charge in 2015.
[4] In 2015, Respondent revised the 2012 Agreement to Arbitrate. As such, the statute of limitations for any NLRA claim under the 2012 version has long since expired. Additionally, the statute of limitations for most, if not all, employment-related claims have expired as well.
[5] The current version of Respondent's arbitration agreement provides: "This Agreement also does not limit your ability to file a charge with a federal, state or local administrative agency (such as the National Labor Relations Board…) and this Agreement does not limit a federal, state or local government agency from its pursuit of a claim in court or the remedies it may seek from a court."

(Jt. Ex. 4 at p. 2) (Emphasis added) The following paragraph also advises employees:

> This Agreement to Arbitrate substitutes one legitimate dispute resolution form (arbitration) for another (litigation), thereby waiving any right of either party to have the dispute resolved in court. This substitution involves no surrender, by either party, of any substantive statutory or common law benefits, protection, or defense for individual claims…" (Jt. Ex. 4 at p. 2)

In accordance with the *Lutheran Heritage* framework, the ALJ and Board previously determined that employees would "reasonably construe" the Agreement to Arbitrate to prohibit them from filing unfair labor practice charges despite the savings clause recited above. The ALJ stated that the "sweeping language in defining the issues subject to solely arbitral resolution is reasonably interpreted by employees to encompass and prohibit the filing of unfair labor practice charges," and that the savings clause was ineffective because it did not "explicitly exclude" unfair labor practice charges filed with the Board. (ALJ Dec., p. 6)

However, the unattainable requirement of "linguistic perfection" is one of the many reasons the Board determined *Lutheran Heritage* was an impracticable standard. *Boeing*, 365 NLRB No. 154, slip op. 10, fn.43. Indeed, the Board criticized the "false pretense" created by *Lutheran Heritage* that employers drafting policies and rules "*can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities." *Id.*, slip op. at 9. Under the Board's new *Boeing* standard, a challenged policy or rule will not be deemed unlawful simply because an employer failed to eliminate all ambiguities. *LA Specialty Produce Co.*, 168 NLRB No. 93, slip op. at 2 (2019).

As detailed below, *Boeing* requires the Agreement to Arbitrate to be viewed from a reasonable employee's perspective and post-*Boeing* cases demonstrate that a reasonable employee would <u>not</u> interpret a mandatory arbitration agreement with a valid savings clause to restrict their Section 7 rights.

A. *Boeing* Requires Interpretation of the Agreement to Arbitrate from the Perspective of a Reasonable Employee

Under *Boeing*, a facially neutral policy or rule requires further analysis if, "when reasonably interpreted, [it] would potentially interfere with the exercise of NLRA rights." *Boeing*, 365 NLRB No. 154, slip op. at 3. In such circumstances, the Board must evaluate: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Id.* Employment policies and rules analyzed pursuant to this framework will fit into one of the following categories:

> *Category 1* will include rules that the Board designates as lawful to maintain either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule…
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA-protected conduct, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designated as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule…

Boeing, 365 NLRB No. 154, slip op. at 3-4.

The Board further clarified these categories in *Specialty Produce*, creating Categories 1(a) and 1(b). *LA Specialty Produce Co.*, 168 NLRB No. 93, slip op. at 2 (2019). A rule will fall under Category 1(a) if the General Counsel fails to meet its initial burden of showing that a reasonable employee would interpret a facially neutral rule to potentially interfere with the exercise of Section 7 rights. *Id*. A reasonable employee is one who is "aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *Id.* When a rule would not be interpreted

to interfere with the employee's Section 7 rights, no balancing of interests or further analysis is necessary. *Id.*

However, if the General Counsel meets its initial burden, there must be a "balancing of that potential interference against the legitimate justifications associated with the rule." *Id.*, slip op. at 3. In many situations, the Board anticipates that it is possible "to strike a general balance" of the competing interests for certain types of rules, "thus eliminating the need for further case-by-case balancing." *Id.* In those situations, when the balancing favors the employer interests, those rules will be lawful and fit into *Boeing* Category 1(b). *Id.* However, "[w]hen the potential for interference with the exercise of Section 7 rights outweighs any possible employer justification," those rules will be unlawful and fit into *Boeing* Category 3. *Id.*

The final category of rules, *Boeing* Category 2, are those that must be analyzed on a case-by-case basis because "the context of the rule and the competing rights and interests are specific to that rule and that employer." *Id.*

B. Mandatory Arbitration Agreements that Contain a Valid Savings Clause Fall under Category 1(a)

In *Prime Healthcare Paradise Valley LLC,* the Board analyzed an arbitration agreement under *Boeing.* 368 NLRB No. 10, slip op. p. 5 (2019). The Board held that arbitration agreements that explicitly "restrict employees' access to the Board or its processes" violate the Act, but facially neutral arbitration agreements require further analysis under *Boeing. Id.* An arbitration agreement violates the Act when, "taken as a whole, [it] make[s] arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." *Id.*, slip op. at 6.

Although the agreement in *Prime Healthcare* did not include a savings clause, the General Counsel asserted the following principle regarding the impact of a savings clause:

> 3. Arbitration agreements with a 'savings clause' that explicitly allows employees to utilize administrative proceedings in tandem with arbitral proceedings should be found lawful and placed in *Boeing* Category 1, since employees would understand that they retain the right to access the Board and its processes, at least where the 'savings clause' is reasonable proximate to the mandatory arbitration language…

Id., slip op. at 3.

The Board has since had the opportunity to squarely address the issue and has confirmed that a savings cause may render an arbitration agreement lawful.

In *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), the agreement at issue broadly mandated arbitration of "[a]ny claim, controversy or dispute." However, the savings clause stated, "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceedings conducted by an administrative agency, including but not limited to . . . the National Labor Relations Board." *Id.*, slip op. at 2. The Board concluded the agreement fell into Category 1(a), explaining that "[w]ith the inclusion and placement of this language, the agreements cannot be reasonably interpreted to prohibit employees from filing Board charges or participating in Board proceedings in *any manner*…" *Id.* (emphasis in original).

In *Anderson Enterprises, Inc.*, the Board expressly rejected "[t]he notion that employers violate the Act by requiring individual employees to arbitrate employment-related claims, while also expressly informing them that they retain the right to file charges with the Board," reasoning that such position could not be reconciled with *Epic Systems*, 138 S. Ct.1612 (2018). 369 NLRB No. 70, slip op. at 5 (2020). The Board determined that the following savings clause rendered the agreement lawful under *Boeing* category 1(a): "Claims may be brought before an administrative agency…Such administrative claims include without limitations claims or charges brought before . . . the National Labor Relations Board." *Id.*; *see also SolarCity Corp.*, 369 NLRB No. 142 (2020).

C. A Savings Clause is Valid if it Informs Employees of their General Right to File Charges

Importantly, it is not necessary that the savings clause specifically reference the Act or the Board. In *Hobby Lobby Stores, Inc.*, the Board explained that a savings clause may be "legally sufficient, even if it does not expressly refer to the 'the National Labor Relations Board,' 'the NLRB,' or 'the Board' if it informs employees that they retained the right to file claims or charges with administrative agencies generally." 369 NLRB No. 129, slip op. at 3 (2020).

The arbitration agreement at issue required arbitration of "all employment-related Disputes," including disputes under several federal employment statutes and "all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws or public policies…" *Id.* The Board determined the following savings clause language sufficiently advised employees of their rights under the Act: "By agreeing to arbitrate all Disputes, Employee and Company understand they are not giving up any substantive rights under federal, state, or municipal law (including the right to file claims with federal, state or municipal government agencies)." 369 NLRB No. 129, slip op. at 3. In reaching this conclusion, the Board stated, "an objectively reasonable employee who understands that the general coverage language encompasses claims under the Act, would also understand that the general savings-clause language permits the filing of a claim with any federal administrative agency, including the Board." *Id.*

D. Respondent's Agreement to Arbitrate Sufficiently Informs Employees of the Right to File Charges or Claims with the Board

Similar to the *Hobby Lobby* agreement discussed above, Respondent's Agreement to Arbitrate explicitly informs employees of their right to pursue administrative claims (i.e., "This agreement does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC)"). The Agreement to Arbitrate also reiterates that the substitution of

arbitration for litigation "involves no surrender, by either party, of any substantive statutory or common law benefit, protection or defense for individual claims." The limiting language is prominent and in close proximity to the language describing covered claims, as they are discussed in consecutive paragraphs. In addition, by both informing employees that they are not giving up any legal benefit, protection or defense for individual claims, and that they retain the right to complete any administrative remedy, Respondent's Agreement to Arbitrate fits even more squarely under Category 1(a) of the *Boeing* test than the agreement in *Hobby Lobby* that was deemed lawful.

Ultimately, an objectively reasonable employee would not interpret Respondent's 2012 Agreement to Arbitrate to prevent them from filing a charge with the Board or accessing its processes. The savings clause specifically advises employees that they maintain the right to seek relief through administrative bodies like the EEOC and the NLRB. Moreover, the fact that employees filed an unfair labor practice charge in this case further demonstrates the Agreement to Arbitrate did not restrict employees from filing charges with the Board.

Accordingly, the Board should find the Agreement to Arbitrate lawful under *Boeing* Category 1(a) and dismiss the Complaint.

IV. CONCLUSION

For all the above reasons, Respondent respectfully requests that the Board refrain from remanding the case to the Administrative Law Judge and instead dismiss the Complaint in its entirety.

Respectfully submitted,

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By: */s/Ross M. Gardner* .

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CERTIFICATE OF SERVICE

I hereby certify:

I am employed in the County of Douglas, State of Nebraska. I am over the age of eighteen years and not a party to the within action; my business address is Jackson Lewis P.C., 10050 Regency Circle, Suite 400, Omaha, NE 68114.

On December 30, 2020, I served **RESPONDENT BRINKER INTERNATIONAL PAYROLL COMPANY LP'S RESPONSE TO NOTICE TO SHOW CAUSE AND BRIEF IN OPPOSITION TO REMAND**

on the parties and interested persons in said proceeding:

X by **first class mail** upon the following persons, addressed to them at the following addresses:

David Miller The Sawaya Law Firm 1600 Ogden Street Denver, CO 80218-1414	Attorneys for Charging Party
Renee C. Barker Board Agent National Labor Relations Board Region 27 Byron Rogers Federal Office Bldg. 1961 Stout Street, Suite 13-103 Denver, CO 80294	Counsel for the General Counsel
Paula S. Sawyer Regional Director National Labor Relations Board Region 27 Byron Rogers Federal Office Bldg. 1961 Stout Street, Suite 13-103 Denver, CO 80294	Regional Director

Additionally, on December 30, 2020, I will electronically file the above-mentioned document with the National Labor Relations Board's Office of Executive Secretary.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed on this 30th day of December 2020, at Omaha, Nebraska.

/s/Ross M. Gardner

Ross M. Gardner